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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 PACIFIC GAS AND ELECTRIC
19 COMPANY,
Defendant.

CASE NO. CR-14-00175-TEH

**DEFENDANT'S MOTION #2:
TO OBTAIN CERTAIN GRAND JURY
TRANSCRIPTS**

Judge: Hon. Thelton Henderson
Date: June 1, 2015
Time: 10:00 AM
Place: Courtroom 2, 17th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 1, 2015, at 10:00 a.m., Defendant Pacific Gas and Electric Company (“PG&E”) will and hereby does move this Court for an order granting its Motion to Obtain Certain Grand Jury Transcripts.

5 Defendant respectfully requests that this Court issue an order requiring the government to
6 produce transcripts of grand jury proceedings reflecting the following: all legal instructions
7 given to the grand jury (including responses to grand jury questions regarding legal issues); all
8 statements by the prosecution or government agents conveying evidence or argument regarding
9 obstruction (Count 1), pressure test recordkeeping (Counts 24-28), and the Alternative Fines Act
10 allegations (sentencing allegations); and statements relating to a deadline or timing for the
11 superseding indictment. The motion will be based on this Notice of Motion and accompanying
12 Memorandum of Points and Authorities, the Declaration of Nicole C. Valco, the files and records
13 of this case, and such other argument and evidence as the Court may consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Grand Jury Clause of the Fifth Amendment requires that the grand jury find probable cause that a defendant committed the crime charged. A grand jury can only do this job if provided with accurate legal instructions and evidence. Here, a review of the superseding indictment and the available grand jury testimony raises the question: Did the prosecution team provide the grand jury with testimony and legal instructions sufficient to comply with the Grand Jury Clause?

By this motion, defendant PG&E requests that the Court take a measured first step toward ensuring such compliance by permitting disclosure of relevant portions of the grand jury transcript record. Any arguments favoring continued secrecy have little weight in these circumstances, especially following indictment and release of *Jencks* material. In any event, they are easily outweighed by the compelling and particularized need to avoid injustice. To the extent any secrecy concerns remain, the defense is willing to review the transcripts under a counsel-only protective order.

The available record raises serious questions whether the superseding indictment can withstand scrutiny under the Grand Jury Clause. For instance, the Count One obstruction charge does not state a material omission that would comply with the standard recently affirmed by the en banc Ninth Circuit in *United States v. Bonds*, No. 11-10669, 2015 WL 1842752 (9th Cir. Apr. 22, 2015) (per curiam) (en banc). In fact, Count One does not allege materiality at all.

For another example, the superseding indictment charges failures to retain various pressure test records, but does not allege that pressure tests were required, which (unnamed) segments are at issue, or whether a pressure test record was ever created. The grand jury would need legal instruction and factual evidence on all of these points before it could conclude that an absence of a record shows that it was subsequently “knowingly” and “willfully” destroyed.

Similarly, the Alternative Fines Act (“AFA”) allegations leave the defendant guessing about what evidence or instructions could have produced the substantial but unexplained fine amounts in the superseding indictment, and the government’s discovery sheds no light. Whether

1 those charges must be dismissed for violations of the Grand Jury Clause based on improper legal
 2 instructions or presentation of evidence will be proven or disproven by reviewing the transcripts
 3 of legal instructions and of testimony of factual summary witnesses.

4 This Court has the authority to allow disclosure of grand jury transcripts. We do not
 5 endorse the cynical adage that “a grand jury would indict a ham sandwich.”¹ Our experience is
 6 that grand juries, like petit juries, make thoughtful decisions—provided they receive appropriate
 7 legal instructions and accurate evidence. It is incumbent upon the prosecution, the defense
 8 lawyers, and this Court to ensure that the Grand Jury Clause’s requirements have been fulfilled.
 9 This motion, we submit, is a modest first-step to protect an important, indeed fundamental,
 10 constitutional right.

11 **II. BACKGROUND**

12 On April 1, 2014, a grand jury returned an indictment charging PG&E with twelve counts
 13 of knowing and willful violations of federal pipeline regulations under 18 U.S.C. § 60123. Five
 14 of the counts related to Line 132, one 28-foot segment of which tragically ruptured in San Bruno
 15 in September 2010. On July 29, 2014, a grand jury—possibly a different one—issued a
 16 superseding indictment with 28 counts.² The superseding indictment added, among other things:
 17 (i) an obstruction charge under 18 U.S.C. § 1505; (ii) five counts of knowingly and willfully
 18 failing to retain pressure test records under 49 C.F.R. § 192.517; and (iii) an allegation of gains
 19 and losses to support an alternative maximum fine under 18 U.S.C. § 3571(d) (the “Alternative
 20 Fines Act” or “AFA”). The circumstances surrounding each of these new charges suggest
 21 irregularities in the grand jury proceedings that produced them.

22 **A. Count One: Obstruction**

23 In Count One, the grand jury charged PG&E with obstructing the National Transportation
 24 Safety Board’s (“NTSB’s”) investigation into the root cause of the explosion that occurred on

25
 26 ¹ The origin of the adage is Judge Wachtler, who made the statement to the New York Daily
 27 News in 1985. *See* <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208>.

27
 28 ² PG&E requested that the government confirm the identities of the grand juries that have
 investigated and indicted PG&E. The government has not yet responded. Valco Decl. Ex. 26.

1 Segment 180 of Line 132. SI ¶¶ 53-54, 61. The superseding indictment alleges that PG&E
 2 obstructed the NTSB investigation by providing a misleading response to one specific data
 3 request that the NTSB had sent PG&E. SI ¶¶ 57-61. The data request in question (not recited in
 4 the indictment) asked PG&E to provide: “copies of all policies, standards, procedures, etc.
 5 related to PG&E’s practice of reestablishing [maximum allowable operating pressure
 6 (“MAOP”)] on its pipelines.” Valco Decl. Ex. 40. Also missing from the indictment is the fact
 7 that the NTSB issued approximately 550 data requests to PG&E over the course of 11 months.
 8 Valco Decl. ¶ 47.

9 PG&E’s original response to the data response at issue provided, among other things, a
 10 copy of a PG&E document titled Risk Management Instruction 06 (“RMI-06”) relating to data
 11 collection for certain of its transmission pipeline segments. SI ¶ 57; Valco Decl. Ex. 40. A few
 12 months later, PG&E discovered that it had mistakenly sent an unapproved draft revision of RMI-
 13 06 under the cover sheet for the approved version then in place. SI ¶¶ 57-59. On April 6, 2011,
 14 PG&E sent a letter to the NTSB withdrawing the unapproved draft, and providing the two
 15 approved versions from 2008 and 2011. SI ¶ 59; Valco Decl. Ex. 41.

16 The indictment alleges that PG&E’s attempt to correct that error contained two omissions
 17 that obstructed the NTSB’s investigation. SI ¶ 60; *see also id.* at ¶¶ 57-58. The indictment does
 18 not allege that any of the statements in the April 6 letter were inaccurate or false. Instead, it
 19 alleges misleading statements in the letter. *Id.*

20 **B. Counts 24 through 28: Knowing and Willful Failure to Maintain Pressure
 21 Test Records**

22 The grand jury charged PG&E with knowingly and willfully failing to retain pressure test
 23 records with required information for the useful life of five of its pipelines. SI ¶ 75. These
 24 counts incorporate by reference paragraphs 1-10, 20-27, and 44-46. SI ¶ 74. None of the
 25 incorporated paragraphs alleges facts supporting a knowing and willful failure by anybody at
 26 PG&E to retain any records of pressure tests that were required, performed, and documented on
 27
 28

1 segments of any of the five lines charged.³ Paragraph 75's conclusory allegation that the
 2 defendant knowingly and willfully failed to retain pressure test records for certain lines is all the
 3 indictment says about PG&E's employees specific conduct for these counts.

4 **C. Sentencing Allegation: Alternative Fines Act**

5 In Paragraph 76, the superseding indictment charges that the defendant is subject to a fine
 6 under the Alternative Fines Act based on its gross gains and losses with respect to the charges,
 7 including gains of approximately \$281 million and losses of approximately \$565 million. The
 8 indictment does not contain any further information about how the grand jury came up with these
 9 two numbers.

10 On July 30, 2014, when the defendant first received the superseding indictment, it asked
 11 the government to explain how these gains and losses had been calculated as PG&E had a
 12 quarterly earnings announcement the next day. Valco Decl. Ex. 12. The government responded
 13 that it could not comment on the grand jury deliberations. Valco Decl. Ex. 13.

14 The following month, the defendant moved to strike the sentencing allegation from the
 15 superseding indictment for lack of factual specificity. *See* PG&E Mot. to Strike, filed 8/29/2014,
 16 Dkt. 33. In opposing defendant's motion, the government apparently resolved its concerns about
 17 commenting on grand jury deliberations. With regard to the loss figure, the government stated:
 18 "The loss amount of \$565 million is based upon PG&E's own filings with the Securities and
 19 Exchange Commission ["SEC"] as to what PG&E has paid to claimants related to the San Bruno
 20 explosion." Opp. to Mot. to Strike, filed 9/5/2014, Dkt. 36 ("MTS Opp."), at 19:23-24. It also
 21 stated: "The gains alleged in the indictment are taken from PG&E's own submissions to the
 22
 23

24 ³ Paragraphs 1 through 10 are introductory allegations describing the explosion on Segment
 25 180 of Line 132 and background on the enactment and promulgation of statutes and regulations
 26 relating to pipeline safety. *See* SI ¶¶ 1-10. Paragraphs 20 through 27 include (a) a summary of
 27 the regulations relating to pressure test records; (b) general statements that PG&E learned that it
 did not have complete data and that it did not maintain pressure test records for the life of every
 gas transmission pipeline; and (c) a description of how PG&E created a Geographic Information
 System database that it intended to maintain pressure test data. *See* SI ¶¶ 20-27. Paragraphs 44
 through 46 allege that PG&E had some incorrect or missing data for Segment 180 of Line 132,
 including that it had no record of a pressure test for that segment. *See* SI ¶¶ 44-46.

1 [CPUC] as to what PG&E plans to spend to bring its pipeline system in compliance with federal
 2 regulations.” MTS Opp. at 19:25-27.

3 Finding nothing in the government’s discovery to substantiate those figures, on
 4 March 31, 2015, the defense again asked the government about the loss and gain calculations
 5 and, additionally, requested grand jury transcripts relevant to these allegations. Valco Decl.
 6 Ex. 21. On April 3, the government again declined to give PG&E any specifics and simply
 7 stated that it had provided discovery with respect to the Alternative Fines Act, and that it would
 8 provide “any relevant grand jury transcripts when [it] provide[s] prior statements of agents.”
 9 Valco Decl. Ex. 22. (It has indicated that it will provide those statements sometime in October.)

10 **D. Other Discovery and Procedural History**

11 On April 24, 2014, this Court granted the government’s request for an order allowing the
 12 production of grand jury transcripts and related exhibits of “all former and current PG&E
 13 employees who testified in the grand jury during the course of the investigation.” Order re Mot.
 14 to Authorize Disclosure, Dkt. 13, at 2. The government has represented that it has produced all
 15 of grand jury transcripts of PG&E’s employees and former employees that testified during
 16 investigation of this case. Valco Decl. ¶ 50, Ex. 24. The government has not produced any
 17 additional grand jury transcripts. On January 12, the government told the Court that it has
 18 completed production consistent with its Rule 16 and *Brady* obligations.⁴ Valco Decl. Ex. 47.

19 On April 10, 2015, PG&E again asked the government to produce transcripts of its
 20 agents’ testimony and statements before the grand jury. Valco Decl. Ex. 23. On April 17, the
 21 government responded that it would produce prior statements of trial witnesses in October
 22 2015—five months before the trial begins, and long after discovery and pre-trial motions are due.
 23 Valco Decl. Ex. 24.

24
 25
 26 ⁴ As set forth in detail in the concurrently filed motion for Rule 16 and *Brady* material, that
 27 production is incomplete in several respects and the government has not, in fact, complied with
 28 its discovery obligations under Rule 16 or *Brady*. The government appears to concede as much,
 stating in a April 17, 2015 letter that it “intends” to comply with those obligations by some
 undisclosed date. Valco Decl. Ex. 24.

1 **III. DISCUSSION**

2 Throughout this Nation's history, the grand jury "has been regarded as a primary security
 3 to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable
 4 function in our society of standing between the accuser and the accused . . . to determine whether
 5 a charge is founded upon reason or was dictated by an intimidating power or by malice and
 6 personal ill will." *United States v. Caruto*, 663 F.3d 394, 398 (9th Cir. 2011) (quoting *United*
 7 *States v. Marcucci*, 299 F.3d 1156, 1161 (9th Cir. 2002)). The Grand Jury Clause "presupposes
 8 an investigative body acting independently of either prosecuting attorney or judge," *id.* (quoting
 9 *United States v. Dionisio*, 410 U.S. 1, 16 (1973)), whose responsibilities "include both the
 10 determination whether there is probable cause to believe a crime has been committed and the
 11 protection of citizens against unfounded criminal prosecutions." *United States v. Samango*, 607
 12 F.2d 877, 882 (9th Cir. 1979). To ensure that "the independence of the grand jury in performing
 13 its historical function is" not "substantially infringed," *Caruto*, 663 F.3d at 398, and that "the
 14 grand jury is [able] to accomplish" both of its "essential functions," *Samango*, 607 F.2d at 882, it
 15 is essential that the grand jury remain both "independent and informed." *Wood v. Georgia*, 370
 16 U.S. 375, 390 (1970).

17 **A. Governing Legal Principles**

18 Although grand jury proceedings are generally secret in nature, that rule is by no means
 19 "absolute." *U.S. Indus., Inc. v. U.S. Dist. Ct.*, 345 F.2d 18, 22 (9th Cir. 1965). In certain
 20 circumstances, "justice . . . demand[s]" that portions of grand jury transcripts be made available
 21 to a criminal defendant. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219-20
 22 (1979); *United States v. Fowlie*, 24 F.3d 1059, 1065 n.5 (9th Cir. 1994). Federal Rule of
 23 Criminal Procedure 6(e)(3)(E) expressly authorizes disclosure of "matters occurring before the
 24 grand jury . . . where the court so directs." *U.S. Indus.*, 345 F.2d at 22.

25 Rule 6(e)(3)(E)(ii), in particular, provides that a court "may authorize disclosure . . . at
 26 the request of a defendant who shows that a ground may exist to dismiss the indictment because
 27 of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii); *Fowlie*, 24 F.3d
 28 at 1065-66; *West v. United States*, No. 08-cr-669, 2010 U.S. Dist. LEXIS 33315, at *9-16, (N.D.

1 Ill. Apr. 5, 2010). An indictment may be dismissed for errors in grand jury proceedings when
 2 they result in actual prejudice to the defendant, *i.e.*, when the ““violation substantially influenced
 3 the grand jury’s decision to indict,’ or [when] there is ‘grave doubt’ that the decision to indict
 4 was free from the substantial influence of such violations.” *United States v. Larrazolo*, 869 F.2d
 5 1354, 1358 (9th Cir. 1989) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256
 6 (1988)). In other words, a court may dismiss an indictment when the grand jury’s independence
 7 was undermined so that “it could not make an informed and unbiased determination of probable
 8 cause.” *Larrazolo*, 869 F.2d at 1359.

9 Various grounds may exist to dismiss an indictment because of a matter that occurred
 10 before the grand jury including, for example: (i) that the prosecutor provided erroneous or
 11 misleading legal instructions to the grand jury, *see, e.g., United States v. Stevens*, 771 F. Supp.
 12 2d 556, 566-68 (D. Md. 2011) (dismissing indictment for erroneous instruction to grand jury
 13 about advice of counsel defense); *United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991)
 14 (possibly erroneous and misleading legal instructions, among other things, amounted to
 15 “prosecutorial impairment of the grand jury’s independent role” and required dismissal);⁵ (ii) that
 16 the prosecutor or a government agent misrepresented facts or provided misleading evidence, *see,*
 17 *e.g., Samango*, 607 F.2d at 882-85 (affirming dismissal of indictment because of prejudice
 18 caused by presentation of misleading testimony to grand jury);⁶ and/or (iii) a prosecutor’s

19
 20 ⁵ *See also United States v. Twersky*, 92 Cr. 1082, 1994 U.S. Dist. LEXIS 8744, at *15
 21 (S.D.N.Y. June 29, 1994) (“[A]n instruction may be so misleading due to mistakes or omissions,
 22 that the ensuing indictment will not be permitted to stand even though it is supported by legally
 23 sufficient evidence”); *United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991) (possibly
 24 erroneous and misleading legal instructions, among other things, amounted to “prosecutorial
 25 impairment of the grand jury’s independent role” and required dismissal); *United States v. Sun
 Myung Moon*, 532 F. Supp. 1360, 1364-65 (S.D.N.Y. 1982) (court has power to review for
 26 dismissal or disclosure of prosecutor’s instructions to determine whether grand jury was misled
 27 as to applicable law); *cf. United States v. Tam Ho*, No. 08-00337, 2009 U.S. Dist. LEXIS 73763,
 28 at *1-2, 6-7 (D. Haw. Aug. 20, 2009) (granting *in camera* review of government instructions to
 grand jury because court could not “rule out that the government did not properly instruct the
 grand jury” regarding an element of the offense).

⁶ *See also United States v. Hogan*, 712 F.2d 757, 761-62 (2d Cir. 1983) (reversing conviction
 because of prejudice caused by misleading statements and false or misleading testimony to the
 grand jury); *United States v. Basurto*, 497 F.2d 781, 786-87 (9th Cir. 1974) (reversing conviction
 when indictment obtained on the basis of false testimony presented by government to grand
 jury); *United States v. Vetere*, 663 F. Supp. 381, 386-87 (S.D.N.Y. 1987) (dismissing indictment

1 comments to the grand jury about meeting a deadline to indict, *see, e.g., id.* at 879, 881-83
 2 (dismissing indictment because prosecutor left 1,000 pages of transcripts and a prepared
 3 superseding indictment with a third grand jury and informed it of an eight-day deadline to
 4 indict).

5 Generally speaking, a party seeking disclosure of grand jury transcripts under Rule
 6 6(e)(3)(E)(ii) must demonstrate “that a ‘particularized need’ exists that outweighs the policy of
 7 grand jury secrecy.” *United States v. Murray*, 751 F.2d 1528, 1533 (9th Cir. 1985). The district
 8 court may “lift[] the secrecy of grand jury proceedings” when “the desired material will avoid a
 9 possible injustice” and “the need for disclosure is greater than the need for continued secrecy.”
 10 *United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991). In doing so, however, the court
 11 should only disclose “relevant parts of the transcript.” *Id.* “As the considerations justifying
 12 secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser
 13 burden in showing justification.” *Petrol Stops Nw. v. Continental Oil Co.*, 647 F.2d 1005, 1008
 14 (9th Cir. 1981) (quoting *Douglas Oil*, 441 U.S. at 223). “When the defense shows a
 15 particularized need for grand jury transcripts that outweighs the need for secrecy, the trial
 16 judge’s function is reduced to eliminating only extraneous material or issuing protective orders
 17 in unusual situations.” *Plummer*, 941 F.2d at 806.

18 **B. The Court May Grant Disclosure of the Legal Instructions Given to the**
 19 **Grand Jury Without A Showing Of Particularized Need**

20 The legal instructions given to the grand jury (or juries) here are critical to evaluating
 21 whether PG&E was fairly charged. The Court may order them to be disclosed without any
 22 further showing of particularized need. Although the “[t]he proceedings before the grand jury
 23 are secret, . . . the ground rules by which the grand jury conducts those proceedings are not.”
 24 *United States v. Alter*, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973). Because “such grounds rules
 25 are not secret,” and “because their disclosure would not reveal the substance or essence of the
 26 grand jury proceedings,” courts within the Ninth Circuit have held that instructions given to the

27 after guilty verdict because of prejudice caused by presentation of false or misleading facts to the
 28 grand jury).

1 grand jury “do not fall within the bar of Rule 6(e),” and have ordered the government to disclose
 2 such instructions to defendants without requiring any additional showing of particularized need.
 3 *United States v. Diaz*, 236 F.R.D. 470, 477-78 (N.D. Cal. 2006); *United States v. Talao*, No. 97-
 4 0217, 1998 WL 1114043, at *12 (N.D. Cal. Aug. 14, 1998); *see also United States v. Jack*, No.
 5 07-0266, 2009 U.S. Dist. LEXIS 133638, at *13 (E.D. Cal. Feb. 20, 2009) (ordering disclosure
 6 of “transcript of the instructions and charges to the grand jury” and noting that government did
 7 not oppose request); *United States v. Fuentes*, No. 07-0248, 2008 U.S. Dist. LEXIS 50425, at
 8 *10 (E.D. Cal. June 24, 2008) (ordering disclosure of same and rejecting government’s argument
 9 that defendant must show “particularized need”).

10 Although some courts have drawn a distinction between the so-called “ground rules” and
 11 more specific “legal instructions,”⁷ the better view is that any instructions given to the grand jury
 12 are subject to disclosure without a showing of particularized need. In both instances, disclosure
 13 does not implicate the secrecy concerns outlined above and would not reveal the substance or
 14 essence of any grand jury proceeding. A Northern District of California case very recently held
 15 precisely that. *See United States v. Belton*, No. 14-cr-00030-JST2015, 2015 U.S. Dist. LEXIS
 16 52426, at *7-8 (N.D. Cal. Apr. 21, 2015). In *Belton*, the defendant sought disclosure of the legal
 17 instructions given to the grand jury on both the original and the superseding indictment. *Id.* at
 18 *8. The court rejected the government’s argument that “specific legal instructions” should be
 19 treated differently for disclosure purposes than the “general instructions that were at issue in
 20 *Alter.*” *Id.* Instead, the court explained that “the legal instructions given to the grand jury
 21 regarding the charges on which they are deliberating are a part of the ‘ground rules’ by which the
 22 grand jury conducts its proceedings.” *Id.* at *9. The court continued: “[t]hose instructions do not
 23 reveal the substance of the grand jury’s deliberative process or other information that would
 24 compromise the secrecy that Rule 6 seeks to protect.” *Id.* Because the reasons for grand jury
 25 secrecy did not apply, the court held that the defendant was “entitled to disclosure of these

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 27 ⁷ *See, e.g., United States v. Morales*, No. S-05-0443 WBS, 2007 U.S. Dist. LEXIS 18013, at *11 (E.D. Cal. Feb. 26, 2007); *United States v. Larson*, No. 07CR304S, 2012 U.S. Dist. LEXIS 133250, at *14 (W.D.N.Y. Sept. 18, 2012).

1 instructions even without a showing of particularized need.” *Id.* The Court should follow *Belton*
 2 and order disclosure of all of the legal instructions given to the grand juries in this case.⁸

3 **C. Any Continued Need for Secrecy Is Minimal At Best**

4 With respect to witness testimony, the protection provided by Rule 6(e) is meant to serve
 5 particular interests: (a) to promote voluntary testimony by prospective witnesses; (b) to promote
 6 full and frank testimony; (c) to prevent those about to be indicted from trying to flee; (d) to
 7 prevent those about to be indicted from attempting to influence grand jurors; and (e) to protect
 8 persons who are accused and exonerated by the grand jury. *Douglas Oil Co.*, 441 U.S. at 218-
 9 19; *Fowlie*, 24 F.3d at 1065 n.5. Where the grand jury has already returned an indictment, the
 10 considerations weighing in favor of secrecy are less relevant and the threshold for justifying
 11 disclosure is correspondingly reduced. *See Douglas Oil*, 441 U.S. at 223; *United States v.*
 12 *Consortium de Realisation S.A. (In re Grand Jury)*, 117 Fed. Appx. 527, 530 (9th Cir. 2004)
 13 (holding that the “district judge . . . properly exercised his discretion in granting disclosure . . . ,
 14 in part, because the close of the grand jury investigation mitigated much of the need for
 15 continued secrecy”); *United States v. Mahoney*, 495 F. Supp. 1270, 1273, 1276 (E.D. Pa. 1980)
 16 (“need for secrecy is greatly reduced [where] grand jury has completed its work and returned an
 17 indictment”). The government has represented that it will be proceeding on the existing
 18 superseding indictment, so there is no concern that any of the information disclosed will affect a
 19 subsequent grand jury in this case. *See* Valco Decl. Ex. 45 at 3:21-4:1. Accordingly, the interests
 20 served by grand jury secrecy are largely absent here. *See Douglas Oil*, 441 U.S. at 218-19.

21 To be sure, grand jury secrecy may also impact the functioning of future grand juries.
 22 *See Douglas Oil*, 441 U.S. at 218-19; *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir.
 23 1993) (“When the grand jury investigation is already terminated and an indictment has been
 24 issued, only ‘institutional’ concerns are implicated by documentary disclosure.”). But that
 25 concern is not meaningfully implicated by the defendant’s request. The government has already

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 27 ⁸ To the extent this Court concludes that a showing of particularized need is nevertheless
 28 required before disclosing the legal instructions, the arguments set forth in Part D, *infra*, readily
 satisfy that standard.

1 produced all grand jury testimony from PG&E witnesses. Valco Decl. Ex. 24. And the
 2 government told the defense that it *will* produce its agents' grand jury testimony (at least with
 3 respect to those who will be testifying at trial), but not until October 2015—after the agreed-
 4 upon and court-ordered pre-trial motions deadline. *Id.*

5 The government, moreover, has not hesitated to disclose information about grand jury
 6 matters when it suits its interests. In opposing defendant's motion to strike and during the
 7 hearing on that motion, the government did not rest on the superseding indictment; it elaborated
 8 on its legal theories and evidence it previously claimed were grand jury matters. In these
 9 circumstances, ordering timely disclosure of discrete, additional portions of the grand jury
 10 transcript record (some of which *will* be disclosed at some point regardless) will have no real
 11 impact on grand jury secrecy.

12 More fundamentally, PG&E seeks only disclosure of government agent and attorney
 13 statements to the grand jury about the governing law and facts. There is no reason to fear
 14 chilling *government* attorneys and witnesses in future grand jury proceedings. Indeed, disclosure
 15 would have the benefit of encouraging the government to provide the grand jury with the tools it
 16 needs to effectuate its constitutional function: accurate instructions regarding the governing law
 17 and evidence that is neither false nor misleading.

18 Finally, any remaining secrecy concerns can be easily mitigated here by issuing a
 19 protective order. *See Plummer*, 941 F.2d at 806 (“when the defense shows a particularized need
 20 for grand jury transcripts that outweighs the need for secrecy, the trial judge’s function is
 21 reduced to eliminating only extraneous material or issuing protective orders[.]”); *see also*
 22 *Consortium de Realisation S.A. (In re Grand Jury)*, 117 Fed. Appx. at 530 (noting that court’s
 23 order created procedural protections that were structured narrowly enough to limit disclosure of
 24 the material needed to prevent unauthorized or overbroad disclosure).

25 **D. The Particularized Need to Obtain Grand Jury Transcripts Outweighs Any
 26 Remaining Need for Grand Jury Secrecy**

27 The facts alleged (and not alleged) in the indictment, the materials produced in discovery,
 28 and the government’s pre- and post-indictment statements demonstrate that the government may

1 have misled the grand jury with respect to the charges added in the superseding indictment
2 (namely, obstruction (Count 1), knowing and willful failure to retain pressure test records
3 (Counts 24-28), and the Alternative Fines Act (sentencing allegation)), and that these
4 irregularities likely substantially influenced the grand jury’s decision to indict. The facts here
5 thus demonstrate a particularized need to obtain grand jury transcripts to support a motion to
6 dismiss the indictment based on one or more of the following three grounds: (i) the prosecution
7 provided erroneous or misleading legal instructions to the grand jury, (ii) the prosecution
8 misrepresented facts or provided misleading evidence to the grand jury, and/or (iii) the
9 prosecution informed the grand jury of a deadline for indictment.

10 The defendant therefore seeks: (i) any legal instructions to the grand jury, including any
11 questions from the grand jury regarding legal requirements and responses (see Part C, *supra*);
12 (ii) any statements by the prosecution or government agents conveying evidence or argument
13 relating to the identified issues; and (iii) any statements relating to a deadline or timing for the
14 indictment. Disclosure of relevant portions of the grand jury transcripts is necessary to confirm whether
15 grounds for dismissal on those bases in fact exist. *See Tam Ho*, 2009 U.S. Dist. LEXIS 73763,
16 at *1-2; *United States v. Wilde*, No. CR-12-0144, 2012 U.S. Dist. LEXIS 111513, at *1-4 (N.D.
17 Cal. Aug. 8, 2012); *Samango*, 607 F.2d at 879, 881-83.

1. Erroneous or Misleading Instructions or Information Likely Prejudiced the Grand Jury's Decision to Charge Obstruction

20 Count One charges PG&E with obstructing the NTSB investigation into the root cause of
21 the San Bruno explosion. As the government has conceded, materiality is an essential element of
22 that obstruction charge. MTS Opp. at 11 (“The obstruction charge will require the government
23 to prove beyond a reasonable doubt . . . that PG&E provided false or misleading information that
24 was material to the NTSB’s investigation[.]”); *see United States v. Thomas*, 612 F.3d 1107,
25 1128-29 (9th Cir. 2010).⁹

9 Although *Thomas* and some of the other cases cited below (such as the en banc Ninth
27 Circuit's recent decision in *Bonds*) were decided under a different obstruction statute than the
one charged here, the language is similar and cases "interpreting section 1503 are relevant to
28 construction of section 1505." *United States v. Laurins*, 857 F.2d 529, 536 (9th Cir. 1988).

1 Based on the language and timing of the superseding indictment, as well as the evidence
 2 produced in discovery, there are compelling reasons to think that the prosecution (1) misstated
 3 the legal standard for proving that a defendant corruptly obstructed an investigation by either
 4 omitting the materiality element entirely or describing it incorrectly, or (2) misled the grand jury
 5 about the context and substance of the NTSB's requests to PG&E and/or the connection between
 6 the NTSB investigation and the information PG&E allegedly failed to disclose.

7 The language of the superseding indictment itself strongly suggests that the grand jury
 8 was misled with respect to the materiality element of the obstruction offense and may well have
 9 been unaware that such an essential element even existed. It contains *no* allegations regarding
 10 materiality. It does not allege that the purportedly obstructive "omissions" in PG&E's April 6,
 11 2011 letter were "material" to the NTSB investigation. And it does not include any facts that
 12 would support such an allegation. For example, the indictment does not allege that the NTSB
 13 sent any follow-up requests regarding PG&E's adherence to a "10%" practice (the NTSB did
 14 not), nor does it allege that the NTSB's ultimate findings about the rupture in San Bruno were in
 15 any way influenced—or even capable of being influenced—by what PG&E allegedly "did not
 16 disclose." Indeed, nothing in the indictment connects the draft language in RMI-06 or the
 17 supposedly undisclosed practices of PG&E's IM group to the segment of Line 132 that ruptured
 18 in San Bruno.

19 The conclusions to be drawn from the indictment's telling silence are further confirmed
 20 by the discovery the government has provided to the defense. The materials produced to date are
 21 devoid of any evidence indicating that the NTSB was even remotely focused on the purported
 22 "omissions" in PG&E's April 6, 2011 response letter. To the contrary, memoranda of interviews
 23 that the government conducted in mid-July 2014 of members of the NTSB San Bruno
 24 investigation team confirm that they did not focus on the 10% question at the time of the
 25 investigation and that they did not follow-up with PG&E about the April 6, 2011 letter. Valco
 26 Decl. Exs. 49-51. Indeed, the allegedly "omitted" information was not even within the scope of
 27 the NTSB data request. Although not alleged in the indictment, the request to which PG&E was
 28 responding asked for "*all policies, standards, procedures*, etc. related to PG&E's practice of

1 reestablishing MAOP on its pipelines.” Valco Decl. Ex. 40 (emphasis added). The NTSB did
 2 not request information about PG&E’s draft policies, unapproved “practices,” or understandings
 3 about whether its practices or draft policies violated the applicable regulations. It is difficult to
 4 conceive of how PG&E’s response could have the natural and probable consequence of
 5 influencing the NTSB investigation if the NTSB *itself* was neither seeking nor focused on the
 6 alleged omissions.

7 The recent guidance about the materiality requirement in *Bonds* only serves to raise
 8 additional concerns about how (or if) the prosecution presented the materiality instructions
 9 and/or the evidence to the grand jury. The allegedly misleading omissions involved a single
 10 response to one of more than 550 data responses issued by NTSB to PG&E. *See Bonds*, 2015
 11 WL 1842752, at *7 (Smith, J., concurring) (“The Government may not isolate a single statement,
 12 prove it misleading or evasive, and argue that the statement is material based solely on that
 13 fact.”); *id.* at *6, 8 (“Applying the materiality standard a single truthful but evasive or misleading
 14 statement can never be material.”); *cf. id.* at *5 (Kozinski, J., concurring) (“Because some non-
 15 responsive answers are among the road hazards of witness examination, any one such statement
 16 is not, standing alone, ‘capable of influencing . . . the decision of [a] decisionmaking body.’”)
 17 (citation omitted). The NTSB never asked any follow-up questions or requested clarification of
 18 that particular response. *Id.* at *7 (Smith, J. concurring) (“The ‘natural and probable effect’ of a
 19 single truthful but evasive or misleading statement is merely to prompt follow-up questions.”).

20 In light of these circumstances, there are compelling reasons to believe that the grand jury
 21 was misled as to the law or facts or both and that, absent such misleading statements, the grand
 22 jury would not have returned an indictment for obstruction. The Court should order the
 23 government to disclose all legal instructions relating to the obstruction count, and all prosecution
 24 or government agent statements or testimony related to the same.

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2. **Erroneous or Misleading Instructions or Information Likely Prejudiced the Grand Jury’s Decision to Charge Violations of Pressure Test Record Regulations**

Counts 24 through 28 charge PG&E with knowingly and willfully failing to retain pressure test records for unspecified segments on five of its pipelines. To prove that charge, the government must establish that: (i) the defendant is an “operator” under the pipeline safety regulations; (ii) (a) a pressure test was required by 49 C.F.R. §§ 192.505 or 192.507,¹⁰ and (b) a pressure test was performed; (iii) the defendant created a pressure test record with certain required information; (iv) the defendant failed to retain that record for the useful life of the pipeline; and (v) the defendant did so knowingly and willfully. *See* 49 C.F.R. § 192.517(a); 18 U.S.C. § 60123.¹¹

Based on the language of the superseding indictment, as well as the government's pre-indictment statements, there are compelling reasons to think that the prosecution (1) misstated the elements or legal standards for proving that a defendant knowingly and willfully failed to retain such a record, (2) misled the grand jury about the state of PG&E's records and/or any conduct that may have resulted in the failure to retain records, or (3) rushed the grand jury to indict.

First, the language of the superseding indictment itself strongly suggests that the grand jury was misled with respect to the elements of the offense. The superseding indictment contains *no* factual (or other) allegations concerning whether a pressure test was required for segments of the charged pipelines, whether a pressure test was ever performed for those segments, whether (if performed) a pressure test record was created, or whether a record that was created was knowingly and willfully discarded or destroyed. Indeed, the only allegation asserting the absence of a pressure test record for any specific segment is for Segment 180 of Line 132. SI

¹⁰ A pressure test is only required by Sections 192.505 and 192.507 if the segment was installed after 1970, when the regulations were first issued. Segments installed before 1970 are subject to a grandfather clause. 49 C.F.R. § 192.619.

¹¹ Section 192.517(a) also prohibits the failure to create a pressure test record, but the government has only charged PG&E with failing to “retain” such a record. SI ¶ 75.

1 ¶ 45. But the indictment also alleges that PG&E installed Segment 180 in 1956 (SI ¶ 43). That
 2 was 14 years before the enactment of Sections 192.505, 192.507, or 192.517, and at a time when
 3 pressure tests (let alone the maintenance of pressure test records) were not required. *See* note 10,
 4 *supra*.

5 *Second*, the government made statements in the weeks before the superseding indictment
 6 suggesting that it was relying primarily on one document to support these charges: a summary
 7 spreadsheet prepared by PG&E in August 2012 containing information about portions of
 8 pipelines for which PG&E was still searching for pressure test records. *See, e.g.*, Valco Decl.
 9 Exs. 5, 8, 10.

10 The government plainly recognized that the August 2012 list was outdated by the time it
 11 was presenting evidence to the grand jury. On June 16, 2014, the government served a subpoena
 12 on PG&E requesting it, in essence, to update the August 2012 list. Valco Decl. Exs. 6, 42, 43.
 13 Referring to this nearly two-year old spreadsheet, the subpoena sought any pressure test records
 14 that had since been located for the identified segments and testimony from a custodian of
 15 records. *Id.* In a follow-up letter, the government explained that it had subpoenaed those records
 16 because “[o]bviously . . . [it] would not want to charge PG&E for any records that it was actually
 17 able to locate.” Valco Decl. Ex. 8. On July 9, 2014, PG&E produced the requested pressure test
 18 records—nearly 8,500 pages. Valco Decl. Ex. 9.

19 Then, two weeks before presenting the superseding indictment to the grand jury, the
 20 government told PG&E that it was unable to “decipher” the thousands of pages of additional
 21 pressure test records that PG&E produced and could not tell “which, if any, of the strength test
 22 pressure records actually correspond to pipeline segments on the list that was attached to the
 23 subpoena.” Valco Decl. Ex. 10. The government also requested attorney work product
 24 identifying the pipeline segment to which the documents pertained or, alternatively, a corporate
 25 representative witness to explain the thousands of pages. *Id.* PG&E objected to both requests.
 26 Valco Decl. Ex. 11. PG&E received no response to its letter, and no PG&E witness testified to
 27 the grand jury about the pressure test records produced on July 9. Valco Decl. ¶ 15.
 28 Accordingly, as of the date of the superseding indictment, the government had not spoken to any

1 PG&E witnesses about the 8,500 pages of supplemental pressure test records that it complained
 2 it could not decipher. Apparently undeterred by any need to determine whether the missing
 3 records had in fact been located (let alone whether they were required or created in the first
 4 place), the government proceeded to seek charges against PG&E. One session later, the grand
 5 jury returned the superseding indictment.

6 *Third*, the pressure test records list itself provides no information that would allow the
 7 grand jury to conclude that any PG&E employee had the requisite knowing and willful intent to
 8 destroy or discard a previously created pressure test record. The list (at best) documents the bare
 9 absence of particular records; it does not speak to *why* the pressure test record does not exist or
 10 even whether it was created in the first place. The following scenarios are equally possible for
 11 any given segment on the list: (1) a pressure test never occurred; (2) a test occurred but a record
 12 was never made; or (3) a record was made but was inadvertently or negligently lost over time.
 13 None of these factual scenarios would support a knowing and willful failure to retain a record of
 14 a required pressure test.

15 In these circumstances, it is more than likely that the grand jury was given erroneous or
 16 misleading legal instructions regarding the elements of the offense, misled regarding the
 17 evidence supporting such charges (including the content and accuracy of the 2012 list), and/or
 18 not given adequate time or information to examine the significant amount of technical data
 19 dumped in its lap at the last minute. Absent misleading statements to the grand jury about the
 20 law or facts, it is probable the grand jury would not have indicted these counts.

21 **3. Erroneous or Misleading Instructions or Information Likely
 22 Prejudiced the Grand Jury's Decision to Charge an Alternative Fine**

23 Imposing an enhanced fine under the AFA requires the government to prove, and the jury
 24 to find beyond a reasonable doubt, facts establishing that (i) *the charged offenses* were the
 25 proximate cause of (ii) a *pecuniary* gain or loss. *United States v. Sanford Ltd.*, 878 F. Supp. 2d
 26 137, 146-53 (D.D.C. 2012); *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 683,
 27 688 (S.D. Tex. 2009) (rejecting arguments that but-for causation alone or non-pecuniary gains or
 28 losses can support an enhanced fine under the AFA). The superseding indictment alleges that

1 PG&E “derived gross gains of approximately \$281 million, and the victims suffered losses of
2 approximately \$565 million.” SI ¶ 76. Presumably, then, *someone* testified before the grand
3 jury regarding both of those figures and the grand jury received legal instructions to the effect
4 that both figures (however calculated) were properly considered “gains” and “losses” under the
5 AFA. Based on the language of the superseding indictment, as well as the government’s post-
6 indictment statements, there are compelling reasons here too to believe that the prosecution
7 (1) misstated the legal standard for proving a pecuniary gain or loss caused by the charged
8 conduct, or (2) misled the grand jury about the nature of the gains or losses that form the basis of
9 the figures alleged.

a. \$565 Million in Losses

11 The indictment itself contains virtually no information about the allegation that victims
12 suffered \$565 million in losses as a proximate result of the charges. In Paragraph 5, it describes
13 the casualties and damage caused by the San Bruno explosion, but no other allegations describe
14 the nature of the losses that comprise the \$565 million calculation.

15 Since the indictment, the government has represented that the alleged \$565 million in
16 losses is based on the amount PG&E reported to the SEC that it would pay claimants related to
17 the San Bruno explosion. MTS Opp. at 19. PG&E’s SEC disclosure states, in relevant part, that
18 PG&E recorded cumulative charges of \$565 million as an estimate of probable loss for third-
19 party claims, including “various lawsuits . . . seek[ing] compensation for personal injury and
20 property damage, and other relief, including punitive damages.” Valco Decl. Ex. 44 at 28.

21 But civil tort settlements, by their nature, are not pecuniary losses. Indeed, civil tort
22 settlements are not an appropriate measure for AFA losses because, among other reasons, they
23 compensate for non-pecuniary harm, like pain and suffering, emotional distress, and punitive
24 damages. *See BP Prods.*, 610 F. Supp. 2d at 702-03 (holding that aggregate civil settlement
25 amount could not constitute “gross loss” for AFA purposes because “[s]uch settlements are just
26 that—settlements—and they include non-pecuniary damages such as pain and suffering,
27 emotional distress, loss of consortium, and punitive damages”). So too here: the \$565 million
28 that PG&E reported in its SEC filings plainly includes payments for alleged non-pecuniary harm.

1 The civil plaintiffs sought damages for pain and suffering, emotional distress, loss of consortium,
2 and punitive damages. *See Valco Decl. Ex. 44* (\$565 million included “compensation for
3 personal injury and property damage, *and other relief, including punitive damages*”) (emphasis
4 added). Thus, the \$565 million that PG&E has paid is necessarily higher than any measure of
5 actual pecuniary loss caused by the charged violations of pipeline regulations.

6 For this \$565 million to form the basis for the AFA allegation in the indictment, one or
7 both of the following likely occurred: (i) the government improperly instructed the grand jury
8 that non-pecuniary harms can form the basis of a calculation of losses for purposes of the AFA
9 or omitted the pecuniary harm requirement altogether, or (ii) the government or its agents
10 misrepresented to the grand jury the harms for which the \$565 million in settlement payments
11 were intended as compensation.

b. \$281 Million in Gains

13 The indictment contains even less information about the allegation that PG&E “gained”
14 \$281 million with respect to the charges. According to the government’s argument opposing the
15 defendant’s motion to strike, the \$281 million is the amount that PG&E is now spending to bring
16 “its *pipeline system* in compliance” with an unidentified set of regulations. MTS Opp. at 19
17 (emphasis added). That is not a proper measure of gains proximately caused by the charged
18 offenses for two reasons: (i) it includes amounts expended to bring PG&E into compliance with
19 regulations not charged in the indictment, and (ii) it includes amounts expended on pipelines that
20 are part of the larger “pipeline system” but that are not the subject of any of the charges in the
21 indictment.

22 Gains supporting an alternative maximum fine must be confined to those proximately
23 resulting from the charged conduct. *See BP Products*, 610 F. Supp. 2d at 699 (holding that
24 alternative fine cannot be based on the refinery’s profits because “the victims have not identified
25 a factual or legal basis for finding that all of BP Product’s profits from the Texas City refinery
26 for the fourteen months—or six years—preceding the accident were derived from the offense”);
27 *Sanford*, 878 F. Supp. 2d at 147 (holding that alternative fine cannot be based on gross revenue
28 from fishing efforts on the ship at issue because the gross gain derived “from [the defendant’s]

1 crimes is a measure that is less than gross revenue[;] . . . the government may not present
 2 evidence of the . . . gross revenue figure in a vacuum for the purpose of establishing ‘gross
 3 gain’’). Money that PG&E is spending on charged pipelines to bring them into compliance with
 4 uncharged regulations, or on pipelines not included in the indictment at all, cannot serve as the
 5 basis for calculating an alternative fine.

6 Moreover, despite its best efforts, PG&E has been unable to determine the source of this
 7 \$281 million gain figure, and the government has refused to say any more about it except to say
 8 it is in the discovery. The defense has reviewed that discovery; in none of these documents does
 9 PG&E indicate that it plans to spend approximately \$281 million “to bring its pipeline system in
 10 compliance with the federal regulations.” MTS Opp. at 19.

11 Accordingly, for this \$281 million to form the basis for the AFA allegation in the
 12 indictment, one or both of the following likely occurred: (i) the government did not properly
 13 instruct the grand jury regarding what kinds of gains can form the basis of an alternative fine
 14 allegation, or (ii) mischaracterized the amount that PG&E has projected to spend on improving
 15 the pipelines charged in the indictment to purportedly bring them into compliance with the
 16 charged regulations.

17 **E. The Request Is Narrowly Tailored to Cover Only Necessary Materials**

18 PG&E limits its request to the materials necessary to assess whether grand jury
 19 irregularities occurred in the government’s presentation of the law and evidence regarding the
 20 topics raised in this motion. As detailed above, this includes all legal instructions given to the
 21 grand jury (including responses to grand jury questions regarding legal issues); all statements
 22 and testimony by the prosecution and its agents regarding obstruction (Count 1), pressure test
 23 recordkeeping (Counts 24-28), and the AFA allegations (sentencing allegations); and all
 24 statements regarding any deadline or other timing requirement with respect to when the
 25 superseding indictment should issue. There is no more narrowly tailored option to ensure that
 26 the Grand Jury Clause has been complied with in this case.

27

28

1 **F. The Court Should Order Disclosure of Records of the Start and End of Any**
 2 **Grand Juries that Have Investigated PG&E**

3 The government first informed PG&E that it was under investigation in 2011. It appears,
 4 therefore, that more than one grand jury was involved in the investigation that led to these
 5 charges. The defense has also asked for records documenting the start and end of any of the
 6 grand juries that have investigated the company. We requested these materials from the
 7 government on April 22, 2015, but have not yet received a response. Valco Decl. Ex. 26.
 8 Although we are hopeful that the government will voluntarily provide these ministerial records
 9 in the ensuing weeks, we did not want today's filing deadline to go by without formalizing its
 10 request.

11 Under the common-law right of access to public records, PG&E is entitled to production
 12 of certain ministerial records. *See In re Special Grand Jury (Anchorage, Alaska)*, 674 F.2d 778,
 13 780-81 (9th Cir. 1982). PG&E seeks orders or records concerning the identification,
 14 commencement, extension, and termination of any grand juries that have investigated PG&E.
 15 Ministerial records with this information, such as orders reflecting the beginning terms and
 16 extension of the terms of the grand juries, relate only to the procedural aspects of their
 17 impaneling and operation and do not reveal the substance or essence of the grand juries'
 18 investigation or deliberations. *See id.* at 781; *Fuentes*, 2008 U.S. Dist. LEXIS 50425, at *4-8;
 19 *United States v. Thomas*, 545 F. Supp. 2d 1018, 1026 (N.D. Cal. 2008); *Diaz*, 236 F.R.D. at 476,
 20 478-79. Thus, they are not covered by the general rule of grand jury secrecy and are properly
 21 subject to disclosure. *Id.*

22 **II. CONCLUSION**

23 Based on the above, PG&E respectfully asks the Court to grant its narrowly tailored
 24 request to obtain grand jury transcripts evidencing any government testimony, argument, or legal
 25 instructions as set forth in the proposed order.

|| Dated: April 27, 2015

Respectfully submitted,

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